IN THE MATTER OF	:	BEFORE THE
6317 MACAW, LLC	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 06-003V

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DECISION AND ORDER

On May 15, 2006, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of 6317 Macaw, LLC, Petitioner, for a variance to reduce the 100-foot setback from a residential district[1] to 32 feet for a parking area to be located in an M-1 (Manufacturing:Light) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Richard B. Talkin, Esquire, represented the Petitioner. Zach Fish and Patrick Dougal testified in support of the petition. No one appeared in opposition to the petition.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

[1] The DPZ report refers to a 150-foot setback that was established by the site development plan for the property. For the purposes of this proceeding, I may only consider the applicable setback established by the Zoning Regulations, which is 100 feet from a residential district.

1. The Petitioner is the owner of the subject property, known as 6317 Macaw Court, which is located in the 1st Election District at the terminus of Macaw Court about 1,200 feet north of South Hanover Road in Elkridge (the "Property"). The Property is referenced on Tax Map 38, Grid 14 as Parcel 853, Parcel C.

2. The Property is roughly pentagonal in shape and consists of 7.471 acres. The lot is about 720 feet wide at its widest span and 600 feet deep. The north and northwest perimeters of the Property, comprising 916 feet, or 40% of the lot's perimeter, are adjacent to residentially zoned property. The topography of the Property is fairly level, but slopes up steeply along the northern boundaries.

The Property is improved by a 210' deep by 70' wide one-story building located about 75 feet from the Macaw Court cul-de-sac in the southern portion of the site. A trailer mounted on blocks is located to the east of the building. Most of the southern and central portions of the site are paved; the paving ends about 150 feet from the northeast and northwest boundaries. A 200' wide by 50' deep stone-covered area is located at the northwest edge of the pavement. The remainder of the northern portion of the site is grass-covered. An 8' tall chain and barbed wire fence begins at a point about 100 feet north of the Macaw Court entrance, runs east about 225 feet to a point 100 feet from the northeast boundary, then runs northwest to a point 35 feet from the northwest boundary. The fence then turns west and extends to the western lot line where it is about 32 feet from the northwest lot line.

The Petitioner's plan depicts various utility, stormwater and drainage easements along the boundary lines. According to the petition, the area encumbered by these easements

and the required setback areas is 2.63 acres, or 35% of the Property, leaving 4.83 acres of buildable area.

3. The Property is currently leased to and used by three businesses – a construction scaffolding leasing business, a trucking business, and a trade school business. The Petitioner proposes to use an area in the northwest portion of the Property for the storage of construction scaffolding equipment and supplies. The storage area will extend from the chain link fence south and will be about 320 feet wide and 100 feet deep. The storage area will therefore encroach about 65 to 68 feet into the 100 foot setback from a residential district required by Section 122.D.2.c.

4. Vicinal properties include:

(a) To the north of the Property is the R-SC zoned portion of Parcel 225, which is currently unimproved and wooded. To the northwest is the R-SC zoned Parcel 963 containing numerous single-family detached dwellings, the closest of which is about 400 feet from the Property.

(b) To the east Parcel 233, an R-12 zoned lot. To the southeast is Parcel D of the Harwood Industrial Center, which is zoned M-1 and improved with a large industrial building.

(c) To the south is Parcel B-1 of the Harwood Industrial Center, which is zoned M-1 and improved with a large industrial building.

(d) To the west of the Property is the M-1 zoned portion of Parcel 225, which is wooded and unimproved.

The DPZ technical staff report indicates that the other M-1 zoned properties in the area are of various sizes and shapes. For example, Parcels 223, 225, B-1, D, E-1, and F are

significantly smaller than the Property. Of these, Parcels 223, D, and E-1 have a significant portion of their perimeters adjoining residentially zoned property. Likewise, Parcel E-2, which appears to be of similar acreage to the Property, shares about half of its perimeter with R-12 zoned lots.

5. Macaw Court is a local road with a cul-de-sac and two travel lanes within a 50 to 60-foot wide right-of-way.

6. Mr. Fish, the project engineer, testified that the closest house to the Property is about 210 feet. He stated that the residential portion of Parcel 225 closest to the Property will not likely be developed with homes but will likely be open space. He stated that the Petitioner will plant landscaping along the area north of the proposed storage area.

7. Mr. Dougal, a principal of the Petitioner, testified that the purpose of the storage area is to allow one of the three tenants to store scaffolding, equipment, and trucks for its operation. The area must have sufficient room for trucks to load and unload the materials and equipment. He stated that there are no other locations available in Howard County with sufficient room for this operation. The storage area must be stone in order to safely accommodate the type of heavy equipment and materials to be stored. Mr. Dougal stated that the building on site is small for an M-1 property.

Mr. Dougal further testified that while some other M-1 zoned properties in the area border on residentially zoned lots, most typically do not. He also stated that the site development plan for Parcel D (Exhibit 5), which was approved in 1975, indicates that parking is permitted up to within 10 feet of the adjoining residential property.[2] Parcel E-2

[2] Mr. Douglas testified that the site plan refers to a variance for the parking setback; however, I can find no such notation on the document.

received an administrative adjustment in 2005 (AA Case No. 05-038; Exhibit 6) to permit storage areas within 80 feet of the adjoining residential property.[3]

Mr. Dougal testified that since 1984 the trucking industry has gone from 40-foot trailers to 53-foot trailers, requiring more space in which to circulate and park vehicles.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

1. The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides that a variance may be granted only if all of the following determinations are made:

> (1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.
>
> (2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.
>
> (3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.
>
> (4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

For the reasons stated below, I find that the requested variance does not comply with Section 130.B.2.a(1) and therefore must be denied.

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[3] The Decision and Order in AA Case No. 05-038 indicates that the 7.091-acre Parcel E-2 suffers from considerable topographic conditions which severely restrict the buildable area of the property. No similar topographic conditions are in evidence here.

2. The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation. Section 130.B.2(a)(1). This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A "practical difficulty" is shown when the strict letter of the zoning regulation would "unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. Ap.. 28, 322 A.2d 220 (1974).

With respect to the first prong of the variance test, the Maryland courts have defined "uniqueness" thusly:

> "In the zoning context, the 'unique' aspect of a variance requirement *does not refer to the extent of improvements upon the property*, or upon neighboring property. 'Uniqueness' of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to characteristics as unusual architectural aspects and bearing or party walls."

North v. St. Mary's County, 99 Md. App. 502, 514, 638 A.2d 1175 (1994)(italics added).

In this case, the Petitioner has not shown that the Property is in any way unique such that the use setback of Section 122.D.2.c will disproportionately impact it. The DPZ staff report shows that the Property is not significantly smaller, shallower or narrower than any

other M-1 lot in the area; in fact, it is larger than most. Even if one considers, as the Petitioner urges, the "more rigorous" setbacks of the M-1 zone when situated next to residential areas together with the easements on the site, the remaining buildable area of the Property is 4.83 acres. Although the Petitioner averred that this is a uniquely constrained building envelope for the M-1 zone, it presented no evidence to prove this fact- that is, there is nothing in the record by which to compare the building envelopes of other M-1 sites to that of the Property. Based solely on the evidence in the record, it would appear that several other M-1 lots in area have smaller and/or narrower building areas. What's more, the Property is relatively level and not constrained by wetlands, steep slopes, or other environmental factors. In short, the Petitioner has not produced sufficient evidence to establish that that the Property is unusual or different from the nature of the surrounding M-1 properties.

In its argument, the Petitioner suggests that the fact that 40% of the Property's perimeter adjoins residentially zoned property renders it unique. This argument suffers from two fallacies. First, it suggests that the mere existence of the setback from residentially zoned property is sufficient reason to grant a variance from it. If this were the case, every M-1 zoned property that adjoins a residentially zoned lot would warrant a variance – effectively emasculating the setback requirement itself. The applicability of the zoning restriction alone cannot be the source of a variance. A. Rathkopf, 3 *The Law of Zoning and Planning,* 58:5 (2004).[4]

[4] "Every zoning ordinance imposes some degree of hardship on all property to which it applies, since the restrictions of the ordinance limit the uses to which the property may be put. This degree of hardship is implicit in zoning…. Such hardship, consistent with the hardship imposed on all other pieces of property in the district, is not a ground for a variance. … The mere fact that property can be put to more profitable uses does not alone establish unnecessary hardship where less profitable alternatives are available within the zoning classification." Id.

Secondly, even if the extent of the Property's location next to residentially zoned property was a permissible consideration, the Petitioner has not produced any evidence to establish that this condition is unique. While the record indicates that 40% of the Property's perimeter adjoins residential zones, the Petitioner failed to compare this to the four other similarly-situated M-1 lots in the area. From the DPZ Report and Exhibit 4, it appears that three of these lots share as much or more of their borders with residential property.

The Petitioner also argues that the variance should be granted because there is no other M-1 lot in the area that can sustain the scaffolding leasing business. It also complains that the use of larger trucks in the trucking industry further constrains the site. If the Property were being used for only one or two of these businesses, these arguments may be worthy of some consideration. But it is only because the Petitioner chooses to combine three major M-1 uses on the site that the Property is unusually constrained. Thus, the hardship in locating the storage area on site appears to be of the Petitioner's own making.[5]

Thus, it is not the size or other physical condition of the site that constrains it, but the extent and location of the existing building, parking areas, storage areas, and other improvements upon it. It appears that the Petitioner could accommodate the storage area within the site without the need for a variance if it reconfigured or reduced the uses on site.

As stated in *North*, I may not consider the location of the improvements on the Property as a unique physical condition of the land for the purposes of the variance requirements. Any practical difficulty must relate to the uniqueness of the land itself, and not to the improvements upon it. I must therefore view the Property as if the improvements had not yet been built. The reason for this rule is to prevent a property owner from creating a

need for a variance. Any practical difficulty must not result from an action of the owner, such as the prior construction of improvements that reduce the building area that remains for additional structures or uses. *Cromwell*, 102 Md. App. at 721-722, 651 A.2d at 439-440. Without this standard that requires the zoning ordinance to create the hardship, a variance could be granted for virtually anything an applicant wants, contrary to the notion that a variance is to be granted sparingly. This would result in the proliferation of variances and the emasculation of the zoning regulations.

"Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship." *Id.* at 694-695, 651 A.2d at 426. In this case, the Petitioner has not produced sufficient evidence to pass the first prong of the variance test; that is, it has not shown that the Property has any unusual or unique characteristic that causes the use setback restriction to disproportionately impact upon it. For this reason, the variance request fails to comply with Section 130.B.2.a(1).

Conclusion

It is well established in Maryland law that any practical difficulty must relate to the land, and not to the personal convenience of the particular owner of the land. *Cromwell, id*. While it may be desirable for the Petitioner to be able to provide the storage area for its tenant, it must be accomplished within the restrictions of the Zoning Regulations. That the variance might allow an improvement to property that is "suitable or desirable or could do no

[5] The Petitioner provided no evidence that it is usual or customary to locate three uses of this type on an M-1 lot.

harm or would be convenient for or profitable to its owner" does not by itself provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432.

It is not the role of zoning, nor should it be, to accommodate the personal wants or circumstances of each property owner. Rather, the purpose of zoning is to promote the orderly development of land through the imposition of uniform regulations and standards. The inherent nature of a variance from setback restrictions tends to disrupt and destroy the uniformity of the spatial relationships between structures in derogation of the zoning plan. For this reason, they are to be granted sparingly and only under exceptional circumstances, for "to do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations." *Marino v. Mayor and City Council of Baltimore*, 215 Md. 206, 216, 137 A.2d 198, 202 (1957); *see also Cromwell*, 102 Md. App. at 722, 651 A.2d at 439-440. The "uniqueness" requirement guards against the proliferation of variances within a uniformly developed community and thereby preserves the land-use patterns established by the community's zoning classification:

> "If the hardship is one which is common to the area the remedy is to seek a change of the zoning for the neighborhood rather than to seek a change through a variance for an individual owner. Thus some exceptional and undue hardship to the individual landowner, unique to that parcel of property and not shared by property owners in the area, is an essential prerequisite to the granting of such a variance."

A. Rathkopf, 3 *The Law of Zoning and Planning* ' 58:11 (2004) (citation omitted).

Simply put, if I were to grant a variance to this Petitioner to accommodate its circumstances, then I must do so for every property owner who is similarly situated. Once granted, a variance is permanent and irreversible. Under such a system, variances would become the rule, and the Zoning Regulations would be rendered meaningless.

The Petitioner in this case has not presented sufficient evidence to show that exceptional circumstances exist to warrant the grant of a variance to the setback requirements. Consequently, I am compelled to deny the request.

ORDER

Based upon the foregoing, it is this **14th day of June 2006,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of 6317 Macaw, LLC for a variance to reduce the 100-foot setback from a residential district to 32 feet for a parking area to be located in an M-1 (Manufacturing:Light) Zoning District, is hereby **DENIED.**

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

_____
Thomas P. Carbo

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.